Supreme Court, U.S.
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No. 04-1081

IN THE

Supreme Court of the United States

FRANK J. CROSBY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

BOWATER INCORPORATED RETIREMENT PLAN FOR SALARIED EMPLOYEES OF GREATER NORTHERN PAPER, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED[1]

Whether the remedies sought by and awarded to Petitioner (an order to pay additional ERISA plan benefits) constituted injunctive or other appropriate equitable relief within the meaning of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

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1. Crosby's question presented is improper in its form and inaccurate as to the issue presented. Supreme Court Rule 14 requires the "Question Presented" to "expressed concisely in relation to the circumstances of the case, without unnecessary detail." Sup. Ct. R. 14.1(a). "The questions should be short and should not be argumentative or repetitive" and "shall be set out on the first page following the cover" with "no other information" on the page. *Id.* Crosby's "Question Presented" runs on for four pages and contains extensive argument, much of which he does not repeat later in the petition and presumably includes simply to circumvent the page limitations of Rule 33.

RULE 29.6 STATEMENT

Bowater Incorporated has no parent corporations. To Bowater's knowledge, no publicly traded companies own 10% or more of the stock of Bowater Incorporated. Massachusetts Financial Services Company and PEA Capital LLC have indicated that they own more 10% or more of Bowater's stock, but Bowater does not believe that either entity is publicly traded. The Bowater Incorporated Retirement Plan for Salaried Employees of Great Northern Paper Inc. (the Plan) is an employee benefit plan sponsored and administered by Bowater Incorporated.

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JURISDICTIONAL STATEMENT

Crosby's jurisdictional statement is incomplete. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Crosby seeks review of a September 9, 2004 opinion of the United States Court of Appeals for the Sixth Circuit. On September 23, 2004, Crosby filed a timely petition for rehearing *en banc*, which was denied. The court of appeals' mandate issued on November 18, 2004. In the district court, Crosby asserted that there was jurisdiction pursuant to 29 U.S.C. § 1132(a) and 28 U.S.C. § 1331. The court of appeals, however, found that it lacked jurisdiction over the subject matter of Crosby's claim.

INTRODUCTION

Petitioner Frank Crosby sued Bowater and the Plan alleging that they did not correctly calculate the optional lump sum distribution of his Plan benefit. Crosby asserted that the Plan's provision for a death benefit equal to the accrued benefit meant that the Plan's Administrator could not consider the risk that Crosby would die before reaching age 65 when computing the present value of his accrued benefit for purposes of calculating his optional lump sum benefit. Crosby elected to sue under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), although he acknowledged that the Plan had paid him a lump sum at least equal to the minimum required by ERISA.

The district court ruled for Crosby, certified a class, and ordered defendants to recalculate lump sums already paid to class members and to pay them any additional benefits owed. Without reaching Crosby arguments about the lump sum calculation, the court of appeals, following *Great-West Life*

& Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002), held that the remedy Crosby sought was not "equitable relief" under ERISA § 502(a)(3).

The Court should deny the petition. This case does not meet any of the criteria set forth in the Rule 10 for granting review. Crosby does not identify any decisions of the courts of appeals that conflict with the decision of the Sixth Circuit or any departure from the "accepted and usual course of judicial proceedings." Sup. Ct. R. 10(a). Crosby likewise does not identify any important issue of federal law that this Court has not already decided. Sup. Ct. R. 10(c). While he purports to identify an important issue of federal law, it is not a novel one. To the contrary, the issue at hand was settled in *Great-West* and Crosby merely seeks the opportunity to re-argue points previously addressed by this Court.

In his lengthy recitation of the question presented, Crosby even goes so far as to suggest that the courts of appeals are in a state of confusion following this Court's decision in *Great-West*. Crosby is careful, however, not to suggest a circuit split, and a review of the decision he cites shows that the courts are not having difficulty applying *Great-West*. Rather, these decisions are simply straightforward applications of *Great-West* with which Crosby evidently disagrees. Of course, Crosby's disagreement with appellate court decisions or this Court's prior holdings is no reason for this Court to grant review.

COUNTER-STATEMENT OF THE CASE

Bowater maintains the Plan for the benefit of certain former employees of Great Northern Paper ("GNP"), such as Crosby, who worked for GNP when Bowater owned that company. (R. 6 Def. Mot. to Dismiss Ex. 1 at 3;[2] Apx. 92). The Plan is a cash balance plan, a type of defined benefit retirement plan (i.e., a plan in which the benefit is not dependent on investment gains of assets held in participants' individual accounts). (R. 1, Compl. ¶ 12, Apx. 17)[3]. Cash balance plan participants have bookkeeping accounts to which the employer records monthly credits. (*Id.* ¶ 13). Typically, these include a compensation credit equal to a percentage of the participant's compensation and an interest credit based upon the account balance. (*Id.*). Participants who leave the sponsor's employment and wait until normal retirement age to receive their retirement benefit continue to receive interest credits until they receive a distribution of their retirement benefit, which is typically an annuity.

Cash balance plan participants may also be allowed to receive a lump sum distribution of their benefit when their employment ceases. Treasury Regulations governing retirement plans have been interpreted to require that such lump sums must be the actuarial equivalent of the participant's accrued benefit under the plan. *See* IRS Notice

2. Defendants refer to the Plan by its section or article number as "Plan § ___" or "Plan Art. ___" and provide a citation to the applicable page of the Appendix.

3. Citations to the district court record are in the form R__ at ___, indicating the docket entry number and page number, respectively. Citations to the joint appendix filed on appeal are in the form Apx.___.

96-8. The Treasury Department has stated that payment of a participant's individual account balance may not satisfy this standard. Instead, it says the plan administrator should (1) project the participant's account balance to normal retirement age (by calculating interest credits as specified in the plan); (2) convert the projected account balance to an annuity, and (3) determine the present value of that annuity using an interest rate and a mortality table. *Id.*

Normal retirement age under the Plan is age 65. (Plan § 1.34; Apx. 99). Upon reaching normal retirement age, a participant is entitled to begin receiving his retirement benefit, which is normally in the form of an increasing life annuity. (Plan §§ 1.32, 1.33 and § A of Appendix A to the Plan, Apx. 99, 156). The Plan allows several other forms of benefit, but specifies that any optional form of payment "shall be the Actuarial Equivalent of the normal annuity form. . . ." (Plan § 12.2, Apx. 134). "Actuarial Equivalent" means:

> . . . another annuity or benefit which commences at a different date and/or is payable in a different form than the Specified Annuity or benefit, but which has the same present value as the specified annuity or benefit when measured on the basis of the interest rate, mortality table, or other factors, if any, which are applicable to such other annuity or benefit, and are specified in Section D of Appendix A as in effect at the date of commencement of such other annuity or benefit.

(Plan § 1.2, Apx. 92).

Article VIII of the Plan also provides that if a participant dies before age 65, no benefit, except the prescribed death benefit, will be paid. (Plan § 8.1, Apx. 122). The death benefit is paid to the participant's beneficiary and is "the then vested present value of the Participant's Accrued Benefit to date of death. . . ." (*Id.*).

In 1999, Crosby became eligible for and elected to receive a lump sum distribution of his retirement benefit, to be paid on January 1, 2001. (R. 20 Pl. Ex. 4; Apx. 329-334). The Plan Administrator told Crosby that his optional lump sum benefit would be $48,732.14, his account balance under the Plan as of December 31, 2000.[4] (*Id.*). Crosby was 43 years old at the time. (R. 20 Pl. Ex. 5; Apx. 000335; R. 6 Ex. 3 at 9, Apx. 175).

Crosby made a claim for additional benefits, alleging that the Administrator had miscalculated his lump sum benefit. (R. 6 Ex. 2; Apx. 162-166). Crosby argued that the Administrator should (1) project his account balance to age 65 with interest credits, (2) convert that amount to an annuity, and (3) calculate the present value of the annuity. (*Id.*). In his initial claim letter, Crosby did not assert that the Administrator was precluded from considering Crosby's mortality risk for the years before he would have reached age 65. (*Id.*).

The Administrator granted Crosby's claim and increased the lump sum to $52,013.90, based upon the approach Crosby

4. According to the Plan document in effect when Crosby elected to receive his lump sum, the optional lump sum was to be "equal to the amount credited to the Participant's Personal Account as of the end of the month preceding his Benefit Commencement Date." (Plan § 12.2(b), Apx. 134).

advocated. (*Id.* Ex. 3, Apx. 167-188). The Administrator reached this conclusion, despite Plan language providing for a lump sum equal to the participant's personal account balance, based upon then-pending litigation regarding cash balance plans "and the Plan Administrator's duty under Section 13.1 to apply the Plan in a manner satisfying the [Internal Revenue] Code's qualification requirements." (*Id.* at 2-3, Apx. 168-169). The Administrator relied upon several Plan provisions in performing its new calculation. (*Id.*[5]). In the district court, Crosby alleged that the Administrator "properly calculated" his lump sum, except for considering "pre-retirement mortality." (R. 1 Compl. ¶¶ 47, 48, Apx. 000023).

Crosby appealed the Administrator's decision. (R. 6 Ex. 4, Apx. 000189). Crosby's appeal letter stated only "this appeal is regarding the mortality discount factor applied," and claimed, "this discount factor is not consistent with the calculation method described in IRS Notice 96-8. Further, I believe the discount reduces my accrued benefit and, thus, is not allowed under ERISA." (*Id.*). In the district court, Crosby expanded on his argument to claim that use of a pre-retirement mortality discount (*i.e.*, a discount to account for the risk that the participant would die before reaching normal retirement age and commencing retirement benefits) was improper principally because of the Plan's death benefit provision. (R. 1 Compl. ¶¶ 49-57, Apx. 23-24). The Pension Administrative Committee rejected Crosby's appeal. (R. 6 Ex. 5, Apx. 190-194).

Crosby then sued on behalf of a class of all Plan participants who had received, or might in the future be

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5. As Plan Administrator, Bowater has the discretion to interpret the Plan. (Plan §§ 1.12, 2.1(b), 2.4(b), (c), (d), Apx. 93, 106, 107).

eligible to receive, optional lump sums. After briefing of dispositive motions and class certification, the district court ruled for Crosby. The district court "enjoined" Bowater and the Plan "to recalculate the lump sum benefits of class members who have previously received lump sum benefits, in accordance with the Court's Opinion, and to immediately refund under-payments, plus pre-judgment and post-judgment interest. . . ." (*Id.* at 2; Apx. 000035). Defendants appealed. (R. 56, Def. Notice of Appeal, Apx. 000060-000062).

The court of appeals reversed. It found that the district court lacked subject-matter jurisdiction because Crosby's claim was not one for "equitable relief" as that term is used in ERISA § 502(a)(3), the section Crosby invoked in filing suit.

REASONS FOR DENYING THE PETITION

I. The Result Reached By The Court Of Appeals Was In Full Accord With Supreme Court Authority, Thereby Negating The Need For Review.

A. The Relief Sought By Crosby Was Not "Appropriate" Within The Meaning Of ERISA § 502(a)(3).

A point on which the court of appeals did not rule, but which is nonetheless dispositive, is that the relief Crosby sought was not "appropriate" within the meaning of ERISA § 502(a)(3). Crosby sued to recover additional benefits he claimed were due under the terms of the Plan and to clarify the rights of other participants to such benefits in the future. That type of claim is permitted by ERISA § 502(a)(1)(B).

This Court has held that ERISA § 502(a)(3) is not an appropriate vehicle for claims that may be brought under other civil enforcement sections of ERISA, such as § 502(a)(1)(B). *Varity Corp. v. Howe,* 516 U.S. 489, 515 (1996). Because Crosby had an adequate remedy under another ERISA section, there is no need for this Court to revisit its decision in *Great-West*, as Crosby asks it to do.

Varity's limitation on § 502(a)(3) remedies derives from the carefully crafted remedial scheme set out in ERISA § 502. ERISA § 502(a) provides, in part, for the following types of civil actions:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought —
>
> (1) by a participant or beneficiary —
>
> * * *
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate

> equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan; . . .

29 U.S.C. § 1132(a).

As this Court has recognized,

> [t]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans ... "The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." [*Massachusetts Mutual Life Ins. Co. v.*] *Russell*, [473 U.S. 134] at 146 [(1985)].

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) (emphasis in original); *see also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (citing *Pilot Life*, *supra*).

Nine years later, in *Varity*, this Court reaffirmed the limited scope of § 502(a)(3):

> The statute authorizes *"appropriate"* equitable relief. We should expect that courts, in fashioning "appropriate" equitable relief, will keep in mind the "special nature and purpose of employee

> benefit plans," and will respect the "policy choices reflected in the inclusion of certain remedies and the exclusion of others." Thus, we should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be "appropriate."

Varity, 516 U.S. at 515 (emphasis in original) (citations omitted).[6]

Following *Varity*, the courts of appeals have uniformly held that no § 502(a)(3) claim can be stated if relief could lie under § 502(a)(1)(B). *Geissal v. Moore Med. Corp.*, 338 F.3d 926, 933 (8th Cir. 2003); *Ogden v. Blue Bell Creameries U.S.A., Inc.*, 348 F.3d 1284, 1287 (11th Cir. 2003) (noting that availability of relief under § 502(a)(3) is not dependent on whether a claim under § 502(a)(1)(B) would succeed, but whether such a claim is available); *LaRocca v. Borden, Inc.*, 276 F.3d 22, 29 (1st Cir. 2002); *Katz v. Comprehensive Plan of Group Ins.*, 197 F.3d 1084, 1088-89 (11th Cir. 1999); *Conley v. Pitney Bowes*, 176 F.3d 1044, 1047 (8th Cir. 1999); *Wilkins v. Baptist Healthcare System, Inc*, 150 F.3d 609, 615 (6th Cir. 1998) ("The Supreme Court clearly limited the applicability of § 1132(a)(3) to beneficiaries who may not avail themselves of § 1132's other remedies."); *Tolson v. Avondale Indus., Inc.*, 141 F.3d 604, 610 (5th Cir. 1998); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475 (9th Cir. 1997).

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6. This Court's decisions construing § 502(a) also defeat Crosby's assertion that ERISA was drafted to provide the "broadest" possible remedies. *See* Petition at 5.

Crosby expressly pursued his claims only under § 502(a)(3). Accordingly, he was limited to relief constituting an injunction to prevent a violation of the Plan or ERISA or "other appropriate equitable relief." The relief Crosby sought, however, was not "appropriate" within the meaning of § 502(a)(3) because adequate relief was available elsewhere. Specifically, because Crosby sought (for himself and certain class members) an award of additional Plan benefits and (for other class members) a declaration as to future benefits entitlement, his claim fit squarely within § 502(a)(1)(B).

Crosby argued (and the court of appeals assumed) that the additional benefits he was seeking were not benefits owed under the Plan. Instead, Crosby argued that he was claiming benefits that were due under ERISA itself. There are numerous problems with this argument.

First, this Court has recognized that ERISA does not mandate any particular level of benefits. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90-91 (1983). The statute instead ensures that plan sponsors provide promised benefits and, to accomplish that goal, it imposes upon pension plans certain funding, vesting, and participation obligations. *See* 29 U.S.C. § 1001(c). Thus, while ERISA contains a host of complex provisions relating to benefit levels for retirement plans, those provisions all serve mainly to ensure that plans provide the benefits they promise. As discussed below, Crosby has admitted that the Plan's Administrator complied with the only ERISA or Internal Revenue Code (I.R.C.) provisions directly addressing the calculation of lump sum benefits (ERISA § 205(g)(3) and I.R.C. § 417(e)(3)).

Second, Crosby's focus on ERISA's rule against forfeiture of a participant's vested accrued retirement benefit

is unavailing because the anti-forfeiture rule in ERISA § 203(a), 29 U.S.C. § 1053(a)(2), protects the "accrued benefit," which is a benefit specified by the plan. 29 U.S.C. § 1002(23) defines "accrued benefit" as "the individual's accrued benefit *determined under the plan* and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age. . . ." *Id.* (emphasis added).[7] Thus, what the statute protects is the benefit provided by the Plan itself. Accordingly, Crosby's "statutory" claim to recover the "accrued benefit" is just a claim to enforce the Plan.

Third, Crosby's arguments about how to correctly calculate lump sums under the Plan all focus on the Plan's language. Crosby admits that ERISA § 205(g)(3) and I.R.C. § 417(e) (which govern lump sum calculations) do not forbid consideration of pre-retirement mortality. Instead, in his appeal brief, he said those statutes merely required that the lump sum to be at least the present value of the accrued benefit computed in accordance with the statutory discount rate and mortality table. Crosby's June 13, 2003 Appeal Brief ("Pl. Br.") 51. Critically, Crosby acknowledges that he received the amount required by statute. The actuarial literature upon which Crosby relies also "recognizes that cash balance plans *may* expressly provide for a forfeiture of the accrued benefit on account of the participant's death *before* normal retirement age." *Id.* at 28 (citations omitted). Crosby is not claiming that ERISA forbade the Plan's Administrator to consider pre-retirement mortality when it calculated Crosby's lump sum.

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7. Section 1054(c)(3) permits a plan to offer optional forms of benefit (such as a lump sum) that are the "actuarial equivalent" of the accrued benefit. 29 U.S.C. § 1054(c)(3).

What Crosby says, however, is that the *Plan* prohibited consideration of preretirement mortality. He says: "[l]ike all other cash balance plans, *the Plan assumes* no preretirement mortality," *Id.* at 27 (heading II, emphasis added), and that "with respect to lump sum distributions, *the Plan plainly assumes* no preretirement mortality. . . ." *Id.* at 29 (emphasis added). The Administrator concluded otherwise. Hence, the courts below were faced with a dispute over the correct interpretation of the Plan.

In the courts below, Crosby tried to avoid the appropriateness limitation on § 502(a)(3) relief by noting that the literal terms of the Plan said his lump sum was to equal his account balance, which is not the benefit he wants. This assertion overlooks the fact that in granting Crosby's initial administrative claim, the Plan Administrator construed the Plan consistent with its obligation to follow the Plan and ERISA. In doing so, the Administrator construed numerous Plan terms, including Sections 1.1, 1.2, and 12, (R. 6 Ex. 5, Apx. 190-94), and concluded that a benefit greater than the account balance was due under the Plan. Thus, it clearly was possible to construe the Plan itself as requiring a lump sum greater than Crosby's account balance but less than the amount he now seeks. That Crosby might have lost a § 502(a)(1)(B) claim because his interpretation of the Plan was wrong — or, at a minimum, the Plan Administrator's interpretation was not arbitrary and capricious — is of no importance. Crosby still had an adequate remedy under § 502(a)(1)(B). *See, e.g., Ogden*, 348 F.3d at 1287 (success or failure of a potential claim for benefits does not determine whether an adequate remedy exists under § 502(a)(1)(B)).

Crosby now tries a new tack to avoid the statutory limits on § 502(a)(3) relief. He claims, at page 10 of his petition,

that he cannot bring a § 502(a)(1)(B) claim because what he is trying to get is the value of the Plan's death benefit and that because that benefit is not payable to him (indeed, he would have to die before it became payable at all), he has no possible claim for that benefit. This argument is completely new (and thus waived) and is absurd. Initially, a claim for benefits is a claim for benefits, regardless whether it is a winner. In addition, the death benefit is irrelevant in this case because Crosby is alive, and by taking a lump sum, he extinguished any right his beneficiary might have had to ever receive such a benefit. Contrary to Crosby's assertion, the lump sum — the benefit over which he sues — is payable to Crosby as a Plan participant and thus he had standing under § 502(a)(1)(B).

Because Crosby's claim is one for Plan benefits and is based upon an argument about what the Plan provides, an adequate remedy existed under ERISA § 502(a)(1)(B). As a result, the relief Crosby sought was not "appropriate" within the meaning of § 502(a)(3).

B. Review Is Not Warranted Because The Court Of Appeals Correctly Applied *Great-West* To Find That The Remedy Crosby Sought Was Not "Equitable" Within The Meaning Of § 502(A)(3).

The crux of Crosby's petition is an attempt to rehash the issues addressed by this Court in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993), and *Great-West*. Crosby claims that the relief he seeks is "equitable" within the meaning of ERISA as this Court *should have* interpreted ERISA. The trouble with Crosby's argument is that this Court has already addressed and rejected it.

The district court awarded Crosby and the class money for benefits allegedly due under a "correct" interpretation of the Plan. An award of additional money for benefits is not available under § 502(a)(3) because it constitutes money damages and is a form of *legal* relief. *See Great-West,* 534 U.S. 204 (2002) (clarifying that only traditional *equitable* relief is available in actions under § 502(a)(3); therefore, a party may not maintain an action for money damages under that section simply by labeling it as a claim for equitable relief).

As noted, to be viable under ERISA § 502(a)(3), plaintiff's claim had to be for injunctive or "other appropriate equitable relief." Rather than requiring some positive action by defendants as an injunction would have done, the sole purpose of Crosby's suit and the district court's remedy was to require the payment of additional money (essentially contract damages) to Crosby and the plaintiff class. As such, the remedy was not truly injunctive and was clearly not "equitable" as this Court has defined that term.

In *Great-West*, this Court stated that "the term 'equitable relief' in § 502(a)(3) must refer to 'those categories of relief that were typically available in equity. . . .'" *Great-West*, 534 U.S. at 210 (quoting *Mertens,* 508 U.S. at 256). In *Great-West*, this Court rejected a medical insurer's claim to enforce a reimbursement provision in an ERISA plan and recover, under § 502(a)(3), a portion of a plan participant's personal injury settlement. This Court noted that although the insurer had labeled its claim one for restitution, it nonetheless sought "to impose personal liability on respondents for a contractual

obligation to pay money — relief that was not typically available in equity." *Id.* This Court stated,

> [a]lmost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to *pay a sum of money* to the plaintiff are suits for "money damages," as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty.

Id. (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 918-19 (1988)) (emphasis added). Accordingly, the Court rejected the insurer's claim under ERISA § 502(a)(3).

Crosby sought an award of money representing additional Plan benefits. He sought to impose upon defendants a personal obligation to pay additional benefits under the Plan. After *Great-West*, the court of appeals was right to find that the remedy Crosby sought was a legal one. Although Crosby argues that awards of benefits have been approved under § 502(a)(3), *see* Petition at 9, citing *Howe v. Varity Corp.*, 36 F.3d 746, 757 (8th Cir. 1994), and claims that they are simply analogous to routine back pay awards, in doing so he ignores *Great-West*, which clearly precludes such relief.

Crosby argues that review is necessary to settle the question of what forms of restitution are available under § 502(a)(3). Again, this point has been resolved. The Court has held that although restitution is generally thought of as a form of equitable relief, "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff the particular funds or property in the defendant's possession." *Great-West*, 534 U.S. at 214.

Crosby's efforts to state a claim for equitable restitution on the theory that defendants are holding money belonging to the plaintiff class is also flawed. First, defendants are not holding any money related to the Plan. Rather, Plan assets are held by a separate trust, which is not a party to this action. (Plan §§ 1.52, 4.1, Apx. 102, 113). Second, none of the money funding the Plan came from the plaintiff class. The Plan is funded solely by employer contributions. (Plan Art. IV, XVII, Apx. 113-114, 153-154). Crosby is attempting to portray the Plan as an individual account plan (*e.g.*, a 401(k) plan) in which a trust holds funds contributed by the employees. In reality, Plan assets are only potentially property of Crosby and the class to the extent each of them is owed benefits under what is essentially a contract (i.e., the Plan).[8] Third, any order requiring payment of benefits is simply a tool to enforce Crosby's interpretation of the Plan and thus is similar to an order requiring a party to a contract to pay damages for breaching the contract. Such relief clearly is not "equitable" under *Great-West*.

Crosby relies upon *Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 250-53 (2000), but that case is inapplicable. In *Harris Trust*, the defendant fraudulently sold worthless interests in motel properties to a pension trust fund. 530 U.S. at 242-43. The defendant had been entrusted with plan assets to invest and was in a position to return the assets along with any ill-gotten gains. 530 U.S. at 243. Here, by contrast, defendants were not wrongful recipients of Crosby's money. Crosby also did not seek to recover specific funds that were wrongfully transferred to defendants. Instead, Crosby seeks to attach defendants' general

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8. Crosby tries to get around these obstacles by arguing that additional Plan assets in good conscience belong to the plaintiff class. That is arguably true, however, in every claim for benefits.

assets as a means to satisfy a judgment for additional Plan benefits stemming from his attempt to enforce the Plan as he interprets it. Thus, defendants can no more be said to be in wrongful possession of his money — and thus subject to an order of equitable restitution — than any defendant in a breach of contract case who allegedly owes money to the plaintiff under the plaintiff's interpretation of the contract.

Similarly, Crosby argues that his claim is "equitable" because he seeks a constructive trust. If that were enough to make a claim for ERISA plan benefits a claim for equitable relief, then every single ERISA benefits claim would be viable under both § 502(a)(1)(B) and § 502(a)(3). This Court's decisions in *Varity*, *Mertens*, and *Great-West* preclude such a result.

Citing *Mertens*, Crosby also tries to rehash the decided question whether trust law defines the scope of "appropriate equitable relief" under § 502(a)(3). Petition at 16-22. Initially, it is evident that *Mertens* offers no support for Crosby's claim. *Mertens* dealt only with whether "ERISA authorizes suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty." *Mertens*, 508 U.S. at 251. In deciding whether the *type* of relief requested by the plaintiffs was authorized by § 502(a)(3), the Court said: "Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory *damages* — monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of *legal* relief." *Id.* at 255 (emphasis in original). The same is true of Crosby's claim – it is for legal relief and thus in not permitted by § 502(a)(3).

Moreover, *Mertens* does not support the broad application of trust-law remedies through § 502(a)(3), as Crosby contends. To the contrary, in *Great-West*, the Court said unequivocally, "[t]hese trust remedies are simply inapposite. In *Mertens*, we rejected the claim that the special equity-court powers applicable to trusts define the reach of § 502(a)(3)." 534 U.S. at 219.

Finally, Crosby's reliance upon *Bowen v. Massachusetts*, 487 U.S. 879 (1988), is also misplaced. As this Court explained in *Great-West*, Bowen focused on a different question, namely the meaning of the term "money damages" in the Administrative Procedure Act. *Great-West*, 534 U.S. at 211-12. In addition, as the Court pointed out in *Great-West*, *Bowen* involved not only a claim for reimbursement of expenses, but also a claim for an injunction regarding the calculation of *future* benef *Id.* In this case, Crosby seeks an "injunction" to require payment of allegedly past due benefits. While Crosby seeks similar relief for future lump sum recipients, the unavailability of that relief for him means he is not a proper class representative and the claims of future lump sum recipients are not properly before the Court.

In addition, as the court of appeals correctly found, there is no meaningful difference between the fact that in *Great-West*, the petitioner sought to enforce a contractual obligation to pay, and in this case, Crosby purportedly seeks to enforce a statutory obligation to pay benefits. *Crosby v. Bowater Incorporated Retirement Plan for Salaried Employees of Great Northern Paper, Inc.*, 262 F.2d 587, 596 (6th Cir. 2004) (citing F.W. Maitland, The Forms of Action at Common Law 63, 64 (A.H. Chayton & W.J Whittaker eds., 1948) and G.C. Cheshire & C.H.S. Fifoot, Law of Contract 15 (3rd ed. 1952)). Indeed, as explained in Part I, Crosby's purported "statutory" claim is really just a claim to enforce his interpretation of the

Plan.

In short, the Sixth Circuit correctly found under this Court's decisions that the relief Crosby sought was not "equitable" relief within the meaning of ERISA § 502(a)(3).

II. Crosby Does Not Identify A Circuit Split On The Question He Presents.

Crosby notes in his lengthy recitation of his question presented that several courts of appeals have recently discussed the implications of *Great-West*. *See* Petition at iv. What he does not say, however, is that the circuits are split on whether an award of ERISA plan benefits is "appropriate equitable relief" or whether such an award can constitute equitable restitution. The cases Crosby cites cover a variety of topics, but none supports Crosby's claim. *Callery v. The U.S. Life Ins. Co.*, 392 F.3d 401 (10th Cir. 2004) (suit to recover the value of life insurance benefits was not proper under § 502(a)(3)); *Griggs v. E.I. Dupont De Nemours & Co.*, 385 F.3d 440 (4th Cir. 2004) (rescission of a benefit election is equitable relief); *Skretvedt v. E.I. Dupont De Nemours*, 372 F.3d 193 (3d Cir. 2004) (interest on delayed payments of benefits is a form of equitable restitution allowed after *Great-West*); *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004) (back pay is not equitable relief under § 502(a)(3)); *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004) (an order to "instate" plaintiffs into special early retirement plan was permissible under § 502(a)(3)).

None of these cases reached a result at odds with the Sixth Circuit's ruling in this case. Contrary to Crosby's assertion, these cases also do not show that the courts of appeals are struggling with the implications of *Great-West*.

Rather, these opinions, and the Sixth Circuit's opinion in this case, show that the courts are working diligently and carefully to follow this Court's holding.

III. Review Is Not Appropriate Because Crosby Merely Seeks To Have This Court Reconsider Its Ruling In *Great-West*.

The crux of Crosby's petition is the statement at page 28 that "this Petition offers the Court the opportunity to reconsider whether Congress actually intended to limit the remedies under ERISA § 502(a)(3) to those that were typically available before the merger of law and equity." This statement contains a tacit admission that the court of appeals reached the right result under *Great-West*. Clearly, the import of this Court's decisions in *Mertens* and *Great-West* is that ERISA limits relief under § 502(a)(3) to types of relief typically available in equity, and the type of relief Crosby seeks is not that type of relief. Crosby's statement also reveals the purpose of his petition is simply to have this Court reconsider its ruling in *Great-West*. That, however, is not a proper reason for granting a petition for certiorari. This Court's decisions are clear in holding that remedies not typically available in equity are not available under § 502(a)(3). If, as Crosby claims, Congress intended otherwise, his appeal should be to that body.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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